IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No. 326 of 1992

For Approval and Signature:

Hon'ble MISS JUSTICE R.M. DOSHIT

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

KULSUMBEM ADAMBHAI

Versus

NOORMOHMAD PIRBHAI

Appearance:

1. Criminal Revision Application No. 326 of 1992
   MRS SANGEETA N PAHWA for Petitioners
   MR PV HATHI for Respondent No. 1
   MR ST MEHTA APP for Respondent No. 2

2. Criminal Misc. Application No 561 of 1993
   MRS SANGEETA N PAHWA for Petitioners
   MR PV HATHI for Respondent No. 1
   MR ST MEHTA APP for Respondent No. 2

CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 12/09/2000

ORAL JUDGEMENT

The petitioners before this Court are the divorced wife and the children of the respondent no. 1 respectively. The petitioner no. 1 and the respondent no. 1 were married sometime in the year 1980 and were divorced in the year 1989. Two children, the petitioners nos. 2 and 3, were born during the said wedlock. After divorce, the petitioners filed Misc. Criminal Application No. 1 of 1990 in the court of Judicial Magistrate, First Class, Botad against the respondent no. 1 for maintenance under Section 125 CrPC. The learned Magistrate by his judgment and order dated 1st October, 1990 allowed the application. The petitioner no. 1 was awarded a monthly maintenance of Rs. 300/= and the petitioners nos. 2 & 3 were awarded a monthly maintenance of Rs. 200/= each. Feeling aggrieved, the respondent no. 1 preferred Criminal Revision Application No. 122 of 1990 before the learned Addl. Sessions Judge, Bhavnagar. The learned Addl. Sessions Judge by his judgment and order dated 4th July, 1992 held that after introduction of the Muslim Women [Protection of Rights on Divorce] Act, 1986 [hereinafter referred to as `the Act'], the parties governed by the said Act could be subjected to the provisions under Section 125 CrPC only in the manner provided for under Section 5 of the Act i.e., only on both the parties agreeing to subject themselves to Section 125 CrPC. In the present case, the respondent no. 1 had not agreed to subject himself to Section 125 CrPC and had objected to the Magistrate's exercising power under Section 125 CrPC. The application was, therefore, not maintainable. The learned Addl. Sessions Judge, therefore, quashed and set-aside the order of the learned Magistrate made on Misc. Criminal Application No. 1 of 1990. Feeling aggrieved, the applicants have preferred the present revision.

The facts undisputed are : the petitioner no. 1 and respondent no. 1 were married in the year 1980 according to the Muslim rights and were divorced in the year 1989, according to the Muslim Shariyat. The petitioners no. 2 & 3 are the children born during the said wedlock.

The learned Magistrate having recorded the evidence has held that the respondent no. 1 had an agricultural income and he was serving as a truck driver also, earning salary of Rs. 1200/= per month. Considering the income of the respondent no. 1 and his other liabilities, a monthly maintenance of Rs. 700/= had been awarded to the petitioners, as aforesaid.

It appears that the learned Addl. Sessions Judge has erred in dismissing the Misc. Criminal Application No. 1 of 1990 in toto. Even if the petitioner no. 1, being a divorced muslim woman, had a right to maintenance under the Act alone, atleast, the petitioners nos. 2 & 3, the children of the respondent no. 1, could have no claim for maintenance under the Act for more than two years from the respective dates of their birth. The application for maintenance under Section 125 CrPC preferred on their behalf cannot be said to be one without jurisdiction and the same could not have been dismissed.

The question is whether after introduction of the Act, the petitioner no. 1 had a right to claim maintenance under Section 125 CrPC. The learned Addl. Sessions Judge has held that unless both the parties ie., the divorced husband and the wife agree to subject themselves to Section 125 CrPC, such application would not be maintainable. I am afraid, this is not the correct interpretation of Section 5 of the Act. Section 3 of the Act provides for, inter alia, a reasonable and fair provision and maintenance to be made and to be paid to a divorced muslim woman. Sub-section 2 thereof reads as under :-

"3. Mahr or other properties of Muslim woman to be given to her at the time of divorce -

(1) xx xx xx xx

(2) Where a reasonable and fair provision and maintenance or the amount of mahr or dower due has not been made or paid or the properties referred in Clause (d) of sub-section (1) have not been delivered to a divorced woman on her divorce, she or any one duly authorised by her may, on her behalf, make an application to a Magistrate for an order for payment of such provision and maintenance, mahr or dower or the delivery of properties, as the case may be. "

Section 5 of the Act reads as under :-

`5. Option to be governed by the provisions of Secs. 125 to 128 of Act 2 of 1974 :

If, on the date of the first hearing of the application under subsection (2) of Sec. 3, a divorced woman and her former husband declare, by affidavit or any other declaration in writing in such form as may be prescribed, either jointly or separately, that they would prefer to be governed by the provisions of Secs. 125 to 128 of the Code of Criminal Procedure, 1973 (2 of 1974), and file such affidavit or declaration in the Court hearing the application, the Magistrate shall dispose such application accordingly.'

In my view the language of Section 5 is clear and simple and requires to be given its natural meaning. The said section applies to the applications made under Sub-section 2 of Section 3 referred to hereinabove ie., in the event an application is made to the Magistrate under sub-section (2) of section 3 of the Act for reasonable provision for maintenance or for the amount of Mahr or Dower or for delivery of any property referred to in Clause (d) of Sub-section 1 of Section 3, the parties to the application ie., the divorced woman and her former husband may choose to be governed by the provisions of Sections 125 to 128 CrPC. In other words, even though the application is one under the Act, the parties thereto have an option to be governed by Sections 125 to 128 CrPC. The said section in my view does not oust the jurisdiction of the Magistrate to entertain applications under Section 125 CrPC made by a divorced muslim woman. The act is one specifically enacted for protecting the rights of divorced muslim women. However, such women are not deprived of the right to maintenance they had already had under Sec. 125 CrPC which is a general provision applicable to all persons to whom CrPC should apply. The purpose of the Act is to confer a right to maintenance and certain other rights upon a divorced muslim woman; irrespective of the personal law by which she is governed But, at the sametime, the Act is not supposed to deprive such woman of the existing right to maintenance which she had under Section 125 CrPC. Hence, I am of the view that even after the introduction of the Act, a divorced muslim woman can legitimately claim maintenance under Section 125 CrPC. Thus, a divorced muslim woman has two remedies available to claim maintenance - one under the Act and another under Section 125 CrPC. As it is apparent, the right to claim maintenance under Section 125 CrPC is limited i.e., she cannot claim a monthly maintenance of more than Rs. 500/=, while no such restriction is found under the Act. Under the Act, the Magistrate would have power to award a reasonable and fair maintenance which,

on facts, may be more than Rs. 500/= a month. Moreover, under the Act, the learned Magistrate has power to order payment of the amount of Mahr or dower and also to order delivery of the properties given to such woman, on or before or after her marriage, by relatives or friends. In the present case, the petitioner no. 1 had preferred to avail of the remedy under Sec. 125 CrPC to the one available under the Act. It is well settled law that when more than one remedy are available to an applicant, the applicant has a right to choose any one of them, which may be most suited to the applicant. The application for maintenance under Section 125 CrPC made by the petitioner no. 1 was maintainable and the learned Magistrate was right in entertaining the same.

In view of the above discussion, the revision application is allowed. Rule is made absolute. The judgment and order dated 4th July, 1992 passed by the learned Addl. Sessions Judge, Bhavnagar in Criminal Revision Application No. 122 of 1990 is quashed and set-aside. The judgment and order dated 1st October, 1990 of the learned Judicial Magistrate, First Class, Botad in Misc. Criminal Application No. 1 of 1990 is restored.

***

Prakash*